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No. 85-52 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

ABINGTON MEMORIAL HOSPITAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Page

Cases:

Bedford County Memorial Hospital v. *Heckler*, No. 84-1672 (4th Cir. Aug. 14, 1985) 1

DeSoto General Hospital v. *Heckler*, 766 F.2d 182 1

Humana of Aurora, Inc. v. *Heckler*, 753 F.2d 1579, petition for cert. pending, No. 85-53 ..... 2, 3

Lloyd Noland Hospital v. *Heckler*, 762 F.2d 1561 1

Menorah Medical Center v. *Heckler*, No. 84-2257 (8th Cir. July 24, 1985) 1

NLRB v. *Wyman-Gordon Co.*, 394 U.S. 759 3

Statutes:

42 U.S.C. 1395x(v)(1)(A)(ii) 2

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1. Subsequent to the filing of our petition for a writ of certiorari, the Fifth Circuit in *DeSoto General Hospital* v. *Heckler*, 766 F.2d 182 (1985), granted in part the Secretary's petition for rehearing and remanded the claims to the Provider Reimbursement Review Board for reconsideration in light of the Secretary's proposed new rule (App., *infra*). The disposition in *DeSoto* is thus in conflict with the decision of the Third Circuit below, as well as with decisions of the Fourth, Eighth and Eleventh Circuits, all of which have held that hospitals successfully challenging the Secretary's new formula for reimbursement of malpractice premiums are presently entitled to payment under the prior formula.[1]

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[1] *Bedford County Memorial Hospital* v. *Heckler*, No. 84-1672 (4th Cir. Aug. 14, 1985); *Menorah Medical Center* v. *Heckler*, No. 84-2257 (8th Cir. July 24, 1985); *Lloyd Noland Hospital* v. *Heckler*, 762 F.2d 1561 (11th Cir. 1985). In *Humana of Aurora, Inc.* v. *Heckler*, 753 F.2d

2. Respondents' basic argument on the remedial issue is that the Secretary's prior regulation must be held to govern their claims for reimbursement since the Secretary's attempt to amend the prior regulation has been ruled invalid.

This argument overlooks the express statutory grant of authority to the Secretary to make "suitable retroactive corrective adjustments" where the reimbursement produced by any particular formula is "inadequate or excessive." 42 U.S.C. 1395x(v)(1)(A)(ii). Thus, any present entitlement to payment under the old formula is subject to retroactive adjustment in the event the Secretary finds that the old formula produces "excessive" reimbursement. Where the Secretary has raised significant questions as to the fairness of the old formula and has instituted a rulemaking proceeding to resolve those questions, it is appropriate to withhold any order directing immediate payment of the funds in dispute under the old formula. Otherwise some hospitals will obtain payment under court judgments purporting to insulate them from recoupment under a later retroactive adjustment, while other hospitals would be subject to such an adjustment for the same cost years. Since all hospitals have known since 1979 that the old formula for Medicare reimbursement of malpractice premiums was in question and accepted Medicare patients on that basis, no unfairness is involved in waiting until the dispute is resolved before final payment is made. Respondents have already been reimbursed for the year ended June 30, 1980 under the new formula and, as our petition points out (at 9), the only amount remaining in dispute is the *difference* between reimbursement under the two formulas.

1579 (1985), petition for cert. pending, No. 85-53, the Tenth Circuit invalidated the rule and remanded the case to the district court "for further proceedings or for remand to the agency." The district court subsequently entered a judgment in favor of the hospitals for an amount certain.

The situation here bears no comparison to *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), as is suggested by respondents in the brief in opposition in No. 85-53. In *Wyman-Gordon*, this Court refused to remand for further proceedings, on the ground that "[t]here is not the slightest uncertainty as to the outcome of a proceeding [on remand] before the Board." 394 U.S. at 767 n.6. Here, however, the outcome of further proceedings is not certain. While the decision below rejects the Secretary's new formula on the basis of the present record, it does not address how the Secretary might proceed on a new record, nor does it prescribe other formulas the Secretary might select. Indeed, the district court in this case, in an opinion that the court of appeals adopted, refused to "specify what method of apportioning malpractice insurance costs should be adopted." Pet. App. 26a-27a. In contrast, orders directing payment under the old formula will have the practical effect of specifying "what method of apportioning malpractice insurance costs" will govern for the hospitals and costs years involved in these cases. That would be an inappropriate disposition, particularly in light of the Secretary's ongoing efforts to comply with the statute in an evenhanded manner.

For these reasons and the reasons stated in our petition, certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

LAWRENCE G. WALLACE*
Acting Solicitor General

SEPTEMBER 1985

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*Acting Solicitor General Fried is disqualified in this case.

APPENDIX

DESOTO GENERAL HOSPITAL, et al.,
Plaintiffs-Appellees,

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS-APPELLANTS

No. 84-3577

United States Court of Appeals, Fifth Circuit.

Aug. 19, 1985

Appeal from the United States District Court
for the Middle District of Louisiana,
Frank J. Polozola, Judge.

ON PETITION FOR REHEARING

(Opinion of July 5, 1985, 5th Cir.
1985, 766 F.2d 182).

Before GARZA, POLITZ and DAVIS, Circuit Judges.

PER CURIAM:

The Secretary of Health and Human Services petitions for rehearing, asking that resolution of this appeal be held in abeyance pending disposition of pending petitions for certiorari in *Abington Memorial Hospital* v. *Heckler*, 750 F.2d 242 (3d Cir. 1984), and *Humana of Aurora, Inc.* v. *Heckler*, 753 F.2d 1579 (10th Cir. 1985). We decline to do so.

The Secretary alternatively requests that we vacate that portion of our opinion modifying the judgment of the district court and directing the reimbursement of the appellee-hospitals "pursuant to 42 C.F.R. § 405.452(b)(1) (1979), without reference to the abrogated malpractice rule." The Secretary urges a remand to the Provider Reimbursement

Review Board for appropriate action, specifically, reconsideration under a proposed new rule affecting malpractice insurance premium reimbursement. *See* 50 Fed. Reg. 25178 (June 17, 1985). This alternative suggestion is meritorious.

The petition for rehearing is granted in part and appellees' claims are remanded to the PRRB for reconsideration in light of relevant changes occurring after the Board's initial rulings herein. In all other respects the petition for rehearing is denied and our original opinion is reconfirmed.